89-1198

No.

IN THE

Supreme Court of the United States

October Term, 1989

ERIC MARROQUIN, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether the time exclusions specified in § 3161(h) of the Speedy Trial Act apply to computing the § 3161(c)(2) command that a federal criminal trial "shall not commence less than thirty days from the date on which the defendant first appears through counsel."

TABLE OF CONTENTS

Page

OPINION BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 10

1. Important problems are raised as to the interpretation and application of § 3161(c)(2) and (h) of the Speedy Trial Act 11

2. The problem of excluding periods of delay in computing the 30-day period of § 3161(c)(2) has caused confusion and conflict in the federal courts 16

CONCLUSION 19

APPENDIX 1a

Court of Appeals opinion 1a

Order denying rehearing 15a

District Court findings on motion to dismiss 17a

TABLE OF AUTHORITIES

Cases: Page

Henderson v. United States,
476 U.S. 321 (1986).....8, 9, 17

United States v. Burton,
584 F. 2d 485 (D.C. Cir. 1978).....15

United States v. Daly,
716 F. 2d 1499 (9th Cir. 1983).....13, 16

United States v. Harris,
724 F. 2d 1452 (9th Cir. 1984).....17

United States v. Karsseboom,
871 F. 2d 877 (9th Cir. 1989).....17

United States v. Mastrangelo,
733 F. 2d 793 (11th Cir. 1984).....10, 11, 16

United States v. Rojas-Contreras,
474 U.S. 231 (1985).....17

United States v. Taylor,
108 S.Ct. 2413 (1988).....15

United States v. Wooten,
688 F. 2d 941 (4th Cir. 1982).....10, 11, 16

Statutes:

Speedy Trial Act, § 3161.....2, *Passim*

Speedy Trial Act, § 3162.....3, *Passim*

Page

Miscellaneous:

Administrative Office of U.S. Courts, Issuance Nos. 28, 30 (1979) 18

Judicial Conference Committee's Guidelines to the Administration of the Speedy Trial Act, 106 F.R.D. 271 (1985) 14

Misner, The 1979 Amendments to the Speedy Trial Act: Death of the Planning Process, 32 Hastings L.J. 635 (1981) 12, 13, 18

Senate Judiciary Committee, Sen. Rep. 96-212, 96th Cong. 1st Sess. (1979) 10, 13

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Eric Marroquin, the petitioner, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit in the above-entitled proceeding.

OPINION BELOW

The opinion of the Fifth Circuit, reprinted in the appendix hereto, is reported at 885 F.2d 1240. The unreported Findings Concerning Defendant's Motion to Dismiss, entered by the United States District Court for the Eastern District of Texas, are reprinted in the appendix hereto, App. 17a, *infra*.

JURISDICTION

The judgment and opinion of the Fifth Circuit were entered on September 27, 1989. On October 30, 1989, the Fifth Cir-

cuit denied petitioner's timely petition for rehearing, as well as his suggestion for rehearing en banc. See appendix hereto, p. 15a, *infra*. On timely application, Justice White on December 7, 1989, ordered that the time for filing this petition for certiorari be extended to and including January 26, 1990.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Speedy Trial Act, 88 Stat. 2076, 18 U.S.C. § 3161, et seq.:

§ 3161. Time limits and exclusions

(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs . . . .

(c)(2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

* * * * *

(d)(2) If the defendant is to be tried upon an indictment or information dismissed by a trial court and reinstated following an appeal, the trial shall commence within seventy days from the date the action occasioning the trial becomes final . . . The periods of delay enumerated in section 3161(h) are exclud-

ed in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

* * * * *

(h) The following periods of delay shall be excluded in computing the time within which an information or indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to---

* * * * *

(F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion.

* * * * *

§ 3162. Sanctions

(a)(2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant.

STATEMENT OF THE CASE

The only question here is whether petitioner's trial commenced too soon within the meaning of the Speedy Trial Act. Was he accorded his right under § 3161(c)(2) of the Act not to have his trial commence "less than thirty days from the date on which [he] first appear[ed] through counsel"? The answer to that question in this case depends on whether the time exclusion specified in § 3161(h)(1)(F) — delay "resulting

from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion'' — applies to the computation of the 30-day period established by § 3161(c)(2).

The procedural events leading to this speedy trial problem are not in dispute. The Fifth Circuit's opinion accurately reflects the general course of events (App. 2a, *infra;* 885 F.2d at 1242-1243). The docket entries, plus the transcripts of court hearings that are part of the record, reveal the following:

1. **June 8, 1987** — Petitioner Marroquin and six others indicted on 58 counts alleging mail fraud and conspiracy to commit mail fraud for a scheme allegedly involving inflated insurance claims for some 17 horses that had died or been destroyed.

2. **June 18, 1987** — Petitioner made his first appearance before the court with counsel on the initial June 8 indictment. The other co-defendants also appeared. Cases set for jury selection and trial on Aug. 17.

3. **July 8 and Aug. 5, 1987** — One co-defendant filed a separate motion for discovery; another co-defendant filed a separate motion for severance.

4. **August 7, 1987** — The Government filed its first superceding indictment, wherein two additional co-defendants (Robert and Donna Primeaux) were added along with 16 additional counts. The number of co-defendants (including petitioner) was now nine, and the counts totalled 74. Eight attorneys were now representing the nine co-defendants.

5. **August 11, 1987** — The two newly named co-defendants, Robert and Donna Primeaux, made their first court appearance. Because the first superceding indictment had added these two additional defendants and added 16 counts, their

appearance triggered the start of the 70-day period for purposes of § 3161(c)(1). See *Henderson v. United States*, 476 U.S. 321, 323 n. 2 (1986). The District Court later, on Oct. 16, stated that the trial was set for Oct. 19, which was the 69th day following the Primeaux arraignments on Aug. 11, in order to be in compliance with § 3161(c)(1). Tr. Oct. 16, at 73. Under the *Henderson* rationale, the Primeaux arraignments on Aug. 11 also triggered the start of the 30-day period for purposes of § 3161(c)(2).

6. **August 14, 1987** — Petitioner pled not guilty to all counts in the original and the superceding indictment. His release on bail was continued.

7. **August 26, 1987** — Court ordered that all pretrial motions and requests be filed by Sept. 15, with a hearing thereon set for Oct. 1. Jury selection and trial to be had "following due consideration of such matters."

8. **August 28, 1987** — Second superceding indictment filed; no change in the number of counts (74) or the number of co-defendants (9). On Sept. 9, petitioner entered a plea of not guilty to all counts of second superceding indictment.

9. **September 15, 1987** — Petitioner filed motion for severance. He also moved to adopt the other pretrial motions of his co-defendants. In addition, the Government filed a motion for discovery.

10. **October 7, 1987** — Following a "status conference" on Sept. 27, the court held a hearing on Oct. 7 in which a variety of pretrial evidentiary motions were ruled upon. Severance motions were argued by each of the eight lawyers, but the court held its rulings on such motions in abeyance after stating that they presented "serious problems." Tr. Oct. 7, at 133. One of the problems that came to light during this hearing was an apparent agreement by the Government with petitioner's

counsel not to try petitioner and co-defendant Mike McKinney together, an agreement which the court never approved. *Id.* at 153-155. Moreover, during the hearing, the Government agreed that four of the co-defendants (Robert and Donna Primaux, Ferguson and Holder) were misjoined, and that in all likelihood three other co-defendants (Bourque, Eversole and Reed) were misjoined. *Id.* at 146, 151. The court preferred, however, to read several cases on misjoinder before ruling on the severance motions. *Id.* at 146.

11. **October 15, 1987** — District Court indicated it intended to rule favorably on severance motions of six of the co-defendants.

12. **October 16, 1987** — Attorneys for the remaining three defendants (McKinney, Eversole and petitioner Marroquin) were told to be prepared for jury selection the following Monday, Oct. 19. The court also indicated it was going to deny petitioner Marroquin's motion to dismiss based on denial of a speedy trial. That motion invoked the speedy trial provisions of § 3161 and asserted that petitioner had never waived any of those rights, by writing or otherwise. The court agreed to enter findings of fact on this motion to dismiss prior to the jury being sworn on Oct. 19. See App. 17a, *infra*.

13. **October 19, 1987** — Jury selected but not sworn; jury to be sworn on Oct. 26, the day set for commencement of trial. But before jury was selected, the court in chambers granted the severance motions of seven of the co-defendants. The court was later to announce that the eighth defendant, Mike McKinney, pled guilty before commencement of trial, leaving only petitioner Marroquin to be tried. Tr. Oct. 27, at 20-21. At that Oct. 27 hearing, the court conceded that "The severance thing has given me trouble from the word go, whether it would be [Rule] 8(b) or 14, and after the October 7 hearing, it really looked like one indictment of, gosh, I don't

know how many different conspiracies and individual counts." Tr. Oct. 27, at 34.[1]

Moreover, at the Oct. 19 hearing, before the jury selection, the Government asked the court to review which horses and which counts the trial was to proceed on, indicating that it wished to proceed on a number of counts that petitioner believed had been severed from the trial. This led petitioner's trial counsel to state (Tr. Oct. 19, at 97, 104):

> Well, my position is, your Honor, it's difficult to prepare, not only for trial but even for jury selection, where here in the middle of the day when we had assumed we were going to be picking the jury, and immediately before picking a jury, now the Government proposes to add additional counts . . . .
>
> Well, frankly, what I'm worried about is, first, coming here on a Monday morning to select some jurors not knowing for certain what counts I'm going to be required to go to trial on, not knowing even what defendants I'm going to be expected to go to trial on, precisely. I thought those things had been resolved finally, after much effort by everyone involved, at approximately noon today . . . Now, to learn at . . . 2:00 p.m. that the Government now proposes to add additional counts at this late date, and I think it just makes the responsibility for representing somebody virtually impossible to

[1]See also the District Court's Findings Concerning Defendant's Motion to Dismiss, wherein the court stated: "I further find that a portion of the delay result[ed] in effect [from] a continuance by this judge on his own motion because of the intricacies, and complex questions by the 74-count indictment involving mail fraud involving nine defendants, and 19 horses, that the ends of justice will be served by proceeding to trial at this time, and the taking of that action by the court outweighs the best interests of the defendant, and regulations in adhering to the time schedule mentioned under the so-called Speedy Trial Act." App. 23a, *infra*.

achieve. We've got some right to know what it is we are charged with and what it is we expect to go to trial on.

13. **October 26, 1987** — Hearing on petitioner's speedy trial motion (which had been filed on Oct. 19) held in chambers prior to swearing of jury. This motion sought to dismiss the indictments under § 3161(c)(1) for failure to bring him to trial within 70 days of the initial appearance of the last of the conspiracy co-defendants on Aug. 11, relying on *Henderson v. United States*, 476 U.S. 321, 323 n. 2 (1986). The court denied this motion, also in reliance on *Henderson*. It found that less than 70 days has passed between that appearance and the impaneling of the jury. See the District Court's Findings Concerning Defendant's Motion to Dismiss, attached hereto, App. 20a-21a, *infra*. The court also noted that once the exclusions under § 3161(h) were applied to that computation, for purposes of § 3161(c)(1) only 24 includable days had passed. In the words of the Fifth Circuit, "Upon hearing this the defendant changed his tune and on October 26, 1987, he moved for dismissal under 18 U.S.C. § 3161(c)(2) for violation of the Speedy Trial Act in commencing trial less than thirty days after his initial appearance. The trial court denied this motion, refusing to apply the section (h) exclusions to the computation of that thirty day period. At this point Marroquin's counsel requested a two week continuance to prepare for trial. He was granted a five day continuance, and the trial actually commenced on November 3, 1987." App. 2a, *infra;* 885 F.2d at 1243.

Following a month-long jury trial in which petitioner was the sole defendant, petitioner was found guilty of five counts of conspiracy to commit mail fraud, 18 U.S.C. § 371, and 19 counts of mail fraud, 18 U.S.C. § 1341.[2] Petitioner was given

[2]The jury was unable to reach a verdict on one of the conspiracy counts and two of the mail fraud counts.

a harsh sentence of five years imprisonment on each of the 24 counts of which he was convicted, five of which are to run consecutively and the rest concurrently — making the total imprisonment sentence 25 years. He was also fined a total of $103,000, mandatorily assesed $450, and ordered to make restitution to the three defrauded insurance companies in the total amount of $198,000.

The Fifth Circuit affirmed the convictions. On the Speedy Trial Act issue, the only issue before this Court,[3] the Fifth Circuit held:

1. "Although more than thirty calendar days had passed since his appearance, if the exclusions enumerated in 18 U.S.C. section 3161(h)(1)(F) were applied to computing the time then less than thirty includable days had passed before his trial commenced."[4] App. 4a, *infra;* 885 F.2d at 1243.

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[3]Petitioner does not renew before this Court the other issues decided by the Fifth Circuit in Parts III, IV, V and VI of the opinion below. Those portions of the opinion involved a double jeopardy claim, an aiding and abetting jury instruction, the admissibility of certain evidence, and the sufficiency of the evidence to support the convictions.

[4]Under the Fifth Circuit's calculation, the 30-day period specified in § 3161(c)(2) began on Aug. 11, 1987, the day on which the last two co-conspirators first appeared in court. See *Henderson v. United States*, 476 U.S. 321, 322 n. 2 (1986): "All defendants who are joined for trial generally fall within the speedy trial computation of the latest codefendant. See 18 U.S.C. § 3161(h)(7)."

But on Aug. 11, there was pending at least one codefendant's motion for severance. Six or seven other severance motions were filed by Sept. 15. These motions were not disposed of until Oct. 19. Thus, if the § 3161(h)(1)(F) exclusions are applicable, all the period between Aug. 11 and Oct. 19 would be excludable, and the 30-day period did not begin to run until Oct. 19. That 30-day period did not expire until Nov. 19. And, despite a 5-day continuance, petitioner's trial commenced on Nov. 3, less than 30 days after the start of the § 3161(c)(2) period.

2. After acknowledging that this is "a case of first impression in this Circuit," the court held that "the section 3161(h) exclusions do not apply to the computations of time under § 3161(c)(2)." App. 4a, *infra*. The court felt that rulings of the Eleventh and Fourth Circuits to that effect were well reasoned, and therefore declined "to set out a different rule for this Circuit." *United States v. Mastrangelo*, 733 F.2d 793 (11th Cir. 1984); *United States v. Wooten*, 688 F.2d 941 (4th Cir. 1982).

3. The court felt that the plain language of the Act compelled the holding that the exclusions of § 3161(h) do not apply to the computation of the 30-day period under § 3161(c)(2), thus making irrelevant a contrary indication in Sen. Rep. 96-212, 96th Cong. 1st Sess. (1979), p. 32. App. 5a-6a, *infra*.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's opinion in this case brings into sharp focus important problems in the interpretation and application of the Speedy Trial Act. Do the time exclusions of § 3161(h) apply only to the computation of the 70-day period specified in § 3161(c)(1)? Or do those exclusions also apply to computing the 30-day period specified in § 3161(c)(2)?

The Fifth Circuit concedes that, if the § 3161(h)(1)(F) exclusions are applied to that 30 day period, "less than thirty includable days had passed before his [petitioner's] trial commenced." App. 4a, *infra*. But the court holds that "the plain language" of § 3161(h) precludes use of such exclusions in measuring the 30-day minimum period specified by § 3161(c)(2). In effect, that 30-day period is said to mean 30 calendar days. Therein lies a significant and perplexing problem in statutory interpretation, one that justifies the grant of certiorari.

1. Important problems are raised as to the interpretation and application of § 3161(c)(2) and (h) of the Speedy Trial Act.

The Fifth Circuit, relying heavily upon opinions of the Eleventh and Fourth Circuits,[5] rests on the questionable proposition that "the plain language" of § 3161(h) precludes application of any of the enumerated periods of delay to computation of the minimum 30-day period specified in § 3161(c)(2).

In other words, the delays enumerated in § 3161(h) are, by the language of that subsection, limited to the computation of "the time within which the trial of any such offense *must* commence." And only § 3161(c)(1), which states that a trial "shall commence within seventy days" of a designated event, constitutes any mandate as to when a trial "must commence." On the other hand, § 3161(c)(2) merely mandates that a trial "*shall not* commence less than thirty days" from the defendant's first appearance in court. Thus, under the Fifth Circuit's reading, no excusable delays can enter into the measurement of the 30-day period, a period designed to guarantee a reasonable minimum period for the preparation of the defense. Such a reading, however, produces the following questions:

(a) However reasonable the Fifth Circuit's reading, cannot "the plain language" of § 3161(h) also be read to factor its enumerated delays into the computation of the 30 to 70-day period during which a trial "must commence"? Moreover, as one study has put it :

> On their face, the provisions of the Act that prescribe sanctions favor the conclusion that excludable time

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[5] *United States v. Mastrangelo*, 733 F.2d 793 (11th Cir. 1984); *United States v. Wooten*, 688 F.2d 941 (4th Cir. 1982).

> does apply to the thirty-day minimum to trial period. Section 3162 creates sanctions "[i]f a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h)." This arguably implies that excludable time is applicable to all time limits contained in section 3161. Section 3161(e) also may be read to imply that excludable time applies to the thirty-day minimum to trial period. Subsection (e) is the last provision within section 3161 that concerns the final 1980 time limits; the 1979 amendments appended the following provisions to it: "The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection." This language suggests that the excludable time provision found in section 3161(h) was intended to apply to all of section 3161. The legislative history, however, only compounds the ambiguity of what the term "subsection" refers to, and leads to no firm conclusion.

Misner, *The 1979 Amendments to the Speedy Trial Act: Death of the Planning Process*, 32 Hastings L.J. 635, 646 (1981).

(b) Does the Fifth Circuit's reading adequately account for the fact that § 3161(c)(2) was added to the Speedy Trial Act by an amendment enacted in 1979? 93 Stat. 327 (1979). The original Act contained only what is now the 70-day provision of § 3161(c)(1) and the delays excludable by virtue of § 3161(h) made obvious reference to the computation of the 70-day period. But, in not atypical fashion, Congress failed to amend § 3161(h) or any other section to make clear whether Congress intended to make the excusable delays applicable to computing the 30-day period specified in the new subsection § 3161(c)(2). Nor did Congress amend the sanctions section,

§ 3162(a)(2), which still speaks of bringing a defendant to trial "within the time limit required by section 3161(c) as extended by section 3161(h)." See *United States v. Daly*, 716 F.2d 1499, 1505-1506 (9th Cir. 1983), (setting forth this 1979 legislative reformulation and subdivision of § 3161(c) into subsections (c)(1) and (c)(2)).[6]

(c) Is the Fifth Circuit's reading too facile, too quick in ignoring whether its reading is consistent with the legislative history and intent? An authoritative study of the 1979 amendments that produced § 3161(c)(2) found that a "careful examination of legislative history of the thirty-day minimum to trial amendment is ambiguous as to the applicability of excludable time. . . . To fathom whether excludable time applies to the thirty-day minimum to trial period, cumbersome analysis cannot be avoided." Misner, *supra* at 644.

(d) Indeed, the Fifth Circuit under the rubric of reading "the plain language" cast aside the one clear indication in the legislative history that excludable time was meant to apply to the 30-day period of § 3161(c)(2). The Senate Judiciary Committee's report on the 1979 amendments to the Act stated:

> Prohibiting trial less than 30 days after the defendant appears in a position to begin preparing his defense more fully protects basic due process rights. It is the Committee's intent that the exclusions provided in section 3161(h) apply to the 30-day minimum to trial provision. Therefore, if an event occurs which would automatically exclude time under 3161(h), such as a pretrial mental examination, that is not only

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[6]In *Daly*, the Ninth Circuit found it unnecessary to determine if the §3162(a)(2) sanction of indictment dismissal applied to a § 3162(c)(2) violation because the defendants in that case had failed to move for a dismissal of the indictment, as required by § 3161(c)(2). But the petitioner in the instant case did move for such a dismissal.

> excluded from computing the time within which the trial must occur prior to imposition of the dismissal sanctions, but the time would also automatically be excluded in computing the 30-day minimum period of time, during which the judge could not schedule trial without the defendant's consent.

Sen. Rep. 96-212, 96th Cong., 1st Sess., p. 32 (1979). The Fifth Circuit dismissed these statements with the observation that the House Report on the 1979 amendments contained no similar comment, and "there is no Conference Report." App. 6a, *infra*. The Judicial Conference Committee's Guidelines to the Administration of the Speedy Trial Act, 106 F.R.D. 271, 279 (1985), also dismissed this Senate Report statement with the following comment:

> In spite of language to the contrary in the report of the Senate Judiciary Committee on the 1979 amendments, . . . it is the view of this Committee that the 30-day minimum period for commencement of trial is not extended by the exclusions of Section 3161(h). Section 3161(h) applies by its terms to "computing the time within which the trial of any such offense *must* commence," language that is not easily read as governing the determination of the period during which trial may *not* commence.

(e) The Fifth Circuit's opinion also seems to ignore the basic policy underlying § 3161(c)(2), which is a due process concern that the defendant be given adequate time to prepare a full defense to the charges against him. In the instant case, the petitioner did not know which if any of his co-defendants would be tried with him, which of the multitude of charges would be at issue at the trial, or which severed co-defendants might testify against him, until the District Court finally resolved all the motions for severance on October 19, 1987. The judge himself admitted that these motions presented difficult

legal issues. But not until then could petitioner begin meaningful preparation for trial. Without benefit of the § 3161(h) exclusions, petitioner was forced to trial on November 3 — a date that violates the minimum time promised by § 3161(c)(2), as the Fifth Circuit impliedly conceded. To say that petitioner was not prejudiced by this turn of events is to ignore the policy underlying that subsection. Who can measure the amount of prejudice occasioned by a violation of § 3161(c)(2)?

Indeed, prejudice may well be a moot factor where, as here, there is a conceded violation of § 3161(c)(2). As this Court said in *United States v. Taylor*, 108 S. Ct. 2413, 2417 (1988), "the statute admits no ambiguity in its requirement that when such a violation has been demonstrated, 'the information or indictment shall be dismissed on motion of the defendant.' § 3161(a)(2)."[7]

(f) Finally, the Fifth Circuit's comment (App. 14a, *infra*) that petitioner was engaged in some "sort of gamesmanship" in asserting his § 3161(c)(2) claim raises a serious question whether a defendant is to be penalized by rushing him to trial before he has had adequate time to prepare a defense. The motions for severance in this complex conspiracy case were filed by others than the petitioner. It was not his game-plan to delay trial until all the charges and the co-defendants had been reduced to their trial dimensions.

Obviously, these provisions of the Speedy Trial Act are ambiguous, unclear and in some respects inconsistent. They are in urgent need of definitive interpretation and clarification by this Court.

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[7]See *United States v. Burton*, 584 F.2d 485, 489 (D.C. Cir. 1978) ("stripping away the opportunity to prepare for trial is tantamount to denying altogether the assistance of counsel for the defense").

2. The problem of excluding periods of delay in computing the 30-day period of § 3161(c)(2) has caused confusion and conflict in the federal courts.

The confused and inconsistent legislative history of the relevant 1979 amendments to the Speedy Trial Act has naturally bred confusion and conflict among the lower federal courts and court administrators.

The Fifth Circuit itself has had a checkered and confusing history on the question whether the § 3161(h) exclusions apply to the § 3161(c)(2) time computation. In the instant case, the Fifth Circuit clearly answers that question in the negative, an answer that is consistent with the cited rulings of the Eleventh and Fourth Circuits. *United States v. Mastrangelo*, 733 F.2d 793 (11th Cir. 1984); *United States v. Wooten*, 688 F.2d 941 (4th Cir. 1982). But slightly more than a year earlier, another panel of the Fifth Circuit answered that same question in the affirmative. In *United States v. Castellano*, 848 F.2d 63, 65 (5th Cir. 1988), a panel held *per curiam* that § 3161(h)(1)(F) "excludes from both the thirty- and seventy-day periods 'delay resulting from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of such motion' " — a ruling that, had it been followed in the instant case, would have required a dismissal of petitioner's indictment.

The Ninth Circuit has also expressed views that in principle appear to conflict with the Fifth Circuit's ruling in this case. Thus in *United States v. Daly*, 716 F.2d 1499, 1506 (9th Cir. 1983), the Ninth Circuit, after reviewing the confusing legislative history of the 1979 amendments to the Speedy Trial Act, observed that "it is open to question" whether Congress intended the § 3161(a)(2) sanction — i.e., dismissal of the indictment for failure to bring a defendant to trial within "the time limit required by section 3161(c) as extended by section 3161(h)" — to apply "to the failure to comply with the 30-day

minimum period prescribed by section 3161(c)(2)." While the Ninth Circuit did not have to answer that question, due to the defendant's failure to move for dismissal of the indictment, the court did not adopt the Fifth Circuit's "plain reading" technique of eliminating all delay exclusions from the computation of the § 3161(c)(2) period.

Additionally, in *United States v. Harris*, 724 F.2d 1452, 1454 (9th Cir. 1984), the Ninth Circuit held that the 30-day period specified in § 3161(c)(2) had to be restarted upon the filing of a superceding indictment. While that ruling is inconsistent with this Court's later ruling in *United States v. Rojas-Contreras*, 474 U.S. 231 (1985),[8] the point is that the Ninth Circuit did not accept the proposition that, on its face, § 3161(c)(2) cannot under any circumstance be affected by delay recognized as excludable by some other provision of the Act. See also *United States v. Karsseboom*, 871 F.2d 877, 879 (9th Cir. 1989), holding that neither the 30-day period of § 3161(c)(2) nor the 70-day period of § 3161(c)(1) restart upon the filing of a superceding indictment since "Congress intended the 30-day and 70-day periods to operate in tandem."

Indeed, the *Karsseboom* reference to the two periods operating in tandem owes its origin to Justice Blackmun's concurring opinion in *Rojas-Contreras*, 474 U.S. at 239. He there stated that the two subsections of § 3161(c) demonstrate "that the 30-day and 70-day periods were intended to operate in tandem; where one runs anew, so should the other." From

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[8]In Rojas-Contraras, this Court held that "the filing of a superceding indictment was not enough by itself to require the restarting of that 30-day period." 474 U.S. at 236. but see *Henderson v. United States*, 476 U.S. 321, 323 n. 2 (1986), holding that when multiple defendants are joined for trial, all the defendants "generally fall withing the speedy trial computation of the latest codefendant." That would seem true where, as in the instant case, the "latest codefendants" were added by a superceding indictment.

which it follows that when one period is stopped by an excludable delay, so should the other.

Perhaps the best illustration of the confusion that surrounds the issue in this case is afforded by the inconsistent interpretations of the Speedy Trial Act published by the Administrative Office of the United States Courts, which are sent to all federal courts. In Issuance No. 28 (Aug. 3, 1979), the Administrative Office advised without comment that the Senate Committee report "indicates that the exclusions are to be applied in calculating the thirty-day period." But in Issuance No. 30 (Dec. 14, 1979), the Administrative Office stated that the 30-day minimum period is *not* extended by the exclusions of § 3161(h). See Misner, *The 1979 Amendments to the Speedy Trial Act: Death of the Planning Process*, 32 Hastings L.J. 635, 650 (1981).

This confusion has been escalated by the Fifth Circuit's decision in this case. Only a definitive decision by this Court can restore consistency, clarity and fairness to the administration of this aspect of the Speedy Trial Act, which vitally affects the statutory rights of all criminal defendants named in multi-count, multi-defendant indictments.

Viewed as a problem of statutory interpretation, the issue here is a most baffling one, not easily answered by the ordinary rules of construction. Criminal defendants are caught in a cross-fire between conflicting rules of statutory construction. Only this Court can resolve such a conflict.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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January 26, 1990

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 88-6136

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ERIC MARROQUIN,

Defendant-Appellant.

Appeal From the United States District Court
Eastern District of Texas
(B-87-00030-CR-01)

(September 27, 1989)

Before BROWN, REAVLEY, and HIGGINBOTHAM Circuit Judges.

HIGGINBOTHAM, Circuit Judge;

Eric Marroquin, was convicted of mail fraud and conspirary to commit mail fraud for schemes involving inflated insurance claims for a number of horses. He appeals his conviction on several grounds, including violation of the Speedy Trial Act, double jeopardy, improperly admitted evidence, and insufficient evidence. We hold that the exclusions found in section 3161(h) of the Speedy Trial Act do not apply to computing the thirty days during which a defendant may not be brought to trial under section 3161(c)(2, so Marroquin is not entitled to relief on Speedy Trial Act grounds. His other claims are likewise meritless, and we therefore affirm.

I. FACTS

On June 8, 1987 Marroquin was indicted along with seven other defendants on 58 counts alleging mail fraud and conspiracy to commit mail fraud. He made his first appearance before the court with counsel on June 18, 1987. Various motions were filed with the trial court between that time and August 7, 1987, when a superseding indictment was filed that included two new defendants. The last named defendants made their appearance on August 11, 1987. The court continued to entertain motions, including motions for severance, up until October 19, 1987, when the severance motions were decided and the jury was selected for Marroquin's trial. On that date Marroquin filed his motion to dismiss the indictments under 18 U.S.C. § 3161(c)(1) for failure to bring him to trial within seventy days of his initial appearance. The trial court denied this motion, finding that less than seventy days had passed between the appearance of the last named defendants and the impaneling of the jury. The district court also noted that once the exclusions under section 3161(h) were applied to the computation of time, for purposes of § 3161(c)(1) only 24 includable days had passed between Marroquin's appearance and the beginning of his trial. Upon hearing this the defendant changed his tune, and on October 26, 1987 he moved for dismissal under 18 U.S.C. § 3161(c)(2) for violation of the Speedy Trial Act in commencing trial less than 30 days after his initial appearance. The trial court denied this motion, refusing to apply the section (h) exclusions to the computation of that thirty day period. At this point Marroquin's counsel requested a two week continuance to prepare for trial. He was granted a five day continuance, and the trial actually commenced on November 3, 1987.

The second indictment contained 74 counts. Marroquin was charged with seven counts of conspiracy to commit mail fraud

(counts 8, 15, 26, 32, 40, 45 and 49), and was charged with 27 counts violating 18 U.S.C. § 1341 (counts 1-7, 9-14, 24, 25, 30, 31, 37-39, 41-44, and 46-48). After nearly a month long trial the jury found Marroquin guilty on all counts except counts 4, 9, and 15, on which the jury could not reach a verdict.

Separate conspiracies were charged for each horse that Marroquin overinsured that later died or was stolen. Each of the seven conspiracies involved Michael McKinney, but each involved various other parties who generally were involved with only one of the horses. All seven alleged a conspiracy to violate 18 U.S.C. § 1341, the mail fraud statute, and the overt acts alleged in each of the counts were similar: purchasing and insuring a horse for more than its purchase price, filing a claim for that amount when the horse died or was stolen within a short time after the sale, and receiving money on each policy. These acts took place over a period of two years, in and around the vicinity of Beaumont, Texas.

At the time that the jury was selected both Marroquin and McKinney maintained that they were innocent, and both were set to go to trial together. Shortly after jury selection, however, McKinney chose to plead guilty to the charges against him and agreed to testify against his former co-defendant. McKinney testified at trial and Marroquin objected to the admission of some of this testimony, and to the admission of a portion of the plea agreement between the United States and McKinney. Marroquin also objected to the admission of testimony concerning his participation in an insurance fraud involving a Corvette.

II. Speedy Trial Act

Marroquin asserts that his trial began within thirty days of his initial appearance in violation of 18 U.S.C. section

3161(c)(2).[1] Although more than thirty calendar days had passed since his appearance, if the exclusions enumerated in 18 U.S.C. section 3161(h)(1)(F)[2] were applied to computing the time then less than thirty includable days had passed before his trial commenced. He urges us to apply the section 3161(h) exclusions to computing the thirty day period during which trial may not commence under section 3161(c)(2).

This is a case of first impression in this Circuit. The Courts of Appeals which have addressed this issue have held that the section 3161(h) exclusions do not apply to the computation of time under § 3161(c)(2). *United States v. Mastrangelo*, 733 F.2d 793 (11th Cir. 1984); *United States v. Wooten*, 688 F.2d 941 (4th Cir. 1982). We believe these decisions to be well reasoned and decline to set out a different rule for this Circuit.

Both *Mastrangelo* and *Wooten* rely on the express language of section 3161(h), which states that the enumerated periods of delay "shall be excluded in computing the time within which an information or indictment must be filed, or in computing

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[1]Section 3161(c)(2) provides:

> Unless the defendant consents in writing to the contrary, the trial shall not commence less than 30 days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

[2]Section 3161(h)(1)(F) provides that:

> (h) The following periods of delay shall be excluded in computing the time within which an in information or indictment must be filed or in computing the time within which the trial of any such offense must commence:
>
> (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to —
>
> (F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion.

the time within which the trial of any such offense must commence." *Mastrangelo*, 733 F.2d at 796-97; *Wooten*, 688 F.2d at 949-51. "There is no language in section 3161(h) which suggests even remotely that its exclusion provisions have any reference to or connection with the time limits fixed by section 3161(c)(2)." *Wooten*, 688 F.2d at 950.

We agree with the Fourth Circuit that this exclusion must have been intentional and not inadvertent, because when Congress intended to incorporate the provisions of section 3161(h) it said so in clear and unmistakable language. *Id.* In section 3161(d)(2), Congress stated: "The periods of delay enunciated in section 3161(h) are excluded in computing the time limitations specified in this section." The explicit inclusion of the section 3161(h) exclusions in other sections of the Act and its omission in 3161(c)(2) would seem to be conclusive that Congress did not intend the exclusions in section (h) to apply to section (c)(2). *See Lankford v. Law Enforcement Assistance Admin.*, 620 F.2d 35, 36 (4th Cir. 1980); *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972).

Marroquin argues that this is an incorrect conclusion because the legislative history of the Speedy Trial Act indicates that section 3161(h) exclusions should apply to section 3161(c)(2). The basis for this argument is found in the Senate Report on the 1979 Amendments to the Act, which states:

> Prohibiting trial less than 30 days after the defendant appears in a position to begin preparing his defense more fully protects basic due process rights. It is the Committee's intent that the exclusions provided in section 3161(h) apply to the 30-day minimum to trial provision. Therefore, if an event occurs which would automatically exclude time under 3161(h), such as a pretrial mental examination, that is not only excluded from computing the time within which the

> trial must occur prior to imposition of the dismissal sanctions, but time would also automatically be excluded in computing the 30-day minimum period of time, during which the judge could not schedule trial without the defendant's consent.

Sen. Rep. 96-212, 96 Cong. 1st Sess. (1979), p.32. The House Report on the 1979 Amendments had no similar comment, however, and there is no Conference Report.

We do not find this legislative history compelling. The plain language of the statue does not call for the application of section (h) exclusions to section (c)(2), and we cannot infer from one committee report that Congress meant the exclusions to apply despite this plain language. As the Fourth Circuit noted, "the report of one House 'does not go very far to show the intention of a majority of both houses of Congress.' " *Wooten*, 688 F.2d at 950, quoting *Davidson v. Gardner*, 370 F.2d 803, 828 (6th Cir. 1967).

The Committee on the Administration of the Criminal Law of the Judicial Conference of the United States also has stated:

> In spite of language to the contrary . . ., it is the view of this Committee that the thirty-day minimum period for the commencement of trial is not extended by the exclusions of Section 3161(h) . . .. Moreover, if the thirty-day minimum were interpreted as subject to the exclusions, the provision would become a powerful weapon for defendants who wanted to delay their prosecutions, a result that is wholly at odds with the major purpose of the statute. Under such an interpretation, the court could be compelled to defer a trial simply because the defendant filed a motion or because the court took a pretrial matter under advisement — both events that trigger periods of excludable time under Section 3161(h)(1).

"Guidelines to the Administration of the Speedy Trial Act of 1974, as Amended," 12-14 (1981).

Not applying the exclusions of § 3161(h) to the computation of time under § 3161(c)(2) does not place defendants at an unfair disadvantage. While the disposition of a motion may affect how a defendant must conduct his defense, a defendant will not necessarily be rushed to trial with no chance to prepare when the charges against him are changed or codefendants are added or dropped from the indictment. A defendant may still be granted a continuance on any appropriate ground.

In light of its purpose and in light of Congress' failure to provide a sanction for violation of § 3161(c)(2), a defendant must show that he was prejudiced by the untimely commencement of trial in order to obtain a new trial. *United States v. Grosshans*, 821 F.2d 1247, 1252-53 (5th Cir. 1987). In this case Marroquin has not shown that he was prejudiced by failure to delay his trial. It was not until his motion for dismissal based upon too great a *delay* in bringing him to trial was denied that the defendant thought to claim that he was being rushed to trial. 138 Calendar days passed between Marroquin's first appearance and the beginning of his trial. During all of that time he knew what the charges were against him, and what evidence the government intended to use against him. It is true that exactly which defendants were to be tried together was not decided until mid-October, but Marroquin's counsel asked for and was granted a continuance to prepare for trial when his motion for dismissal was denied. Marroquin was not prejudiced by the fact that a longer continuance was not granted.

Defendant's trial was commenced within the time period allowed by the Speedy Trial Act, and we decline to reverse his conviction on those grounds.

III. Double Jeopardy

Marroquin contends that he has been more than once placed in jeopardy for the same offense because the multiple conspiracies for which he was tried and convicted in reality constituted one conspiracy. The indictment charged separate conspiracies to defraud the insurance companies with respect to each horse, but Marroquin contends that if any conspiracy existed, it was one agreement to fraudulently collect on inflated equine insurance policies.

The double jeopardy provision of the Fifth Amendment prohibits multiple prosecutions for the same offense. *See United States v. Marable,* 578 F.2d 151 (5th Cir. 1978). Because the essence of a conspiracy lies in the agreement to violate the law, the government must prove a separate agreement for each conspiracy conviction it seeks. *Id.* at 153.

In this case, however, no motion to dismiss the indictment was filed pursuant to Rule 12(b)(2) of the Federal Rules of Criminal Procedure, and Marroquin has raised this issue for the first time on appeal. In *United States v. Gerald,* 624 F.2d 1291, 1300 (5th Cir. 1980), this court held that failure to object to an indictment on grounds of multiplicity prior to trial waved that objection pursuant to Rule 12(b)(2). Therefore Marroquin is precluded from challenging his conviction on more than one count of conspiracy.

Even if a defendant waives his right to assert a multiplicity claim, he may still object to multiple sentences. *United States v. Cauble,* 706 F.2d 1322 (5th Cir. 1983); *United States v.Bradsby,* 628 F.2d 901 (1980). Even then, if the sentences are to be served concurrently the defendant may not raise a multiplicity claim if it was not raised prior to trial. *Cauble,* 706 F.2d at 1334-35. This concurrent sentence doctrine is inapplicable here, however, for although the prison sentences

of all conspiracy counts run concurrently, there were mandatory assessments as to Counts 32, 40, adn 49. These mandatory assessments make the sentences cumulative. *See Ray v. United States* 481 U.S. 736, 107 S.Ct. 2093 (1987).

It is impossible for this court to determine that there was an error made by the district court in determining this issue, for this issue was never before the district court. It is therefore not a proper issue to be determined on direct appeal. The issue would be more properly raised in a motion pursuant to 28 U.S.C. § 2255, which would provide for a hearing before the district court wherein both parties could have an opportunity to present evidence on the issue to a fact finder. *See United States v. Atkins*, 834 F.2d 426 (5th Cir. 1987).

Marroquin failed to object to the indictment on the ground of multiplicity prior to trial, so he is precluded from attacking his convictions on that ground. Marroquin may contest the validity of multiple sentences, despite his failure to object earlier, in a collateral proceeding pursuant to 28 U.S.C. § 2255.

IV. Jury Instruction Re: Aiding and Abetting

Marroquin argues that the aiding and abetting instruction given to the jury[3] was improper in that no charge of aiding and abetting was included in the indictment.

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[3]The charge to the jury included the following:

The law recognizes that, ordinarily anything a person can do for himself may also be accomplished by him through direction of another person or persons in a joint effort or enterprise.

. . ., then the law holds the defendant responsible for the acts and conduct of such other persons as though he had committed the acts or engaged in such conduct himself. . ..

In *United States v. Gordon*, 812 F.2d 965 (5th Cir. 1987), this court held that "the words 'aid and abet' need not appear in the indictment in order to sustain a conviction as aider and abettor," and that "one who has been indicted as a principal may be convicted on evidence showing that he has merely aided and abetted the commission of the offense." 812 F.2d at 969. Therefore, this instruction was proper as a statement of the law for any of the substantive offenses for which Marroquin was indicted.

Marroquin's contention that this instruction lessened the government's burden of proof with regard to the conspiracy charges against him is likewise meritless. The conspiracy counts on which Marroquin was convicted all refer to conspiracies with specific persons. There is no evidence that the jury could have found a conspiracy with the named persons based upon some joint effort with persons unknown.

V. Admissibility of Evidence.

Marroquin has objected to the admission of several pieces of evidence. In particular, he objects to the admission of: (1) his former co-defendant's testimony concerning other equine insurance frauds that the co-defendant had perpetrated; (2) the part of McKinney's plea agreement calling for the payment of $400,000 restitution; and (3) the evidence of an insurance fraud in which Marroquin had participated involving a non-existent Corvette.

The standard of review of a trial court's determination that evidence is admissable is whether or not there has been an abuse of discretion. *United States v. Vincent*, 681 F.2d 462, 465 (5th Cir. 1982). Here the district court did not abuse its discretion, and all of the evidence about which Marroquin complains was properly admitted.

Co-defendant McKinney became a government witness after his guilty plea. In addition to testifying about his and Marroquin's involvement in the insurance fraud of which Marroquin was charged, McKinney testified about other equine insurance frauds he had perpetrated. The judge gave an instruction to limit the use of this evidence to determining witness credibility. Evidence of McKinney's other fraudulent activity would be a proper area for cross-examination under the Federal Rules of Evidence, section 608(b), and Marroquin had access to this information. It is permissible for the prosecution to "blunt the sword" of anticipated impeachment by revealing the information first. As this court noted in *United States v. Borchardt*, 698 F.2d 697 (5th Cir. 1983):

> Counsel presenting witnesses of blemished reputation routinely bring out "such adverse facts as they know will be developed on cross-examination" in order to avoid even the appearance of an "intent to conceal."

698 F.2d at 701.

Marroquin implies that this admission somehow tainted him, and therefore was prejudicial and should not have been admitted. Marroquin has not shown such prejudice. There is no evidence that the government tried to use this evidence to imply that Marroquin participated in these other frauds or was guilty of crimes for which he was not being charged. Marroquin cites us to no authority to show that the trial court's limiting instruction was not adequate. The trial court did not abuse its discretion in admitting this evidence.

Marroquin also argues that the admission of the plea agreement showing McKinney's $400,000 restitution obligation was prejudicial. He has not demonstrated undue prejudice for the admission of this evidence. The subject of the plea agreement was first brought up on direct examination by the prosecution

in general terms. The defense did not object to this testimony. On cross-examination defense counsel inquired about this plea agreement on at least three separate occasions. Upon redirect the prosecution tendered the plea agreement evidence to which Marroquin objects. Marroquin does not object to the admissability of the entire plea agreement, only to the part that outlines the obligation to pay $400,000 in restitution.

A witness-accomplice guilty plea may be admitted into evidence if it serves a legitimate purpose and a proper limiting instruction is given. *United States v. Borchardt*, 698 F.2d 697, 701 (5th Cir. 1983). Here the plea agreement was introduced into evidence with the limiting instruction that it was to be considered only as evidence of the credibility of witness McKinney. In a similar case before the Eleventh Circuit, *United States v. McClain*, 823 F.2d 1457 (11th Cir. 1987), the court found that it was proper to introduce a plea agreement to show that there was no "sweetheart deal," the reason given for the introduction in this case. Given that the subject of the plea agreement was raised by the defense on direct examination, the agreement was introduced to show that there was no sweetheart deal between McKinney and the government, and the trial judge gave a proper limiting instruction, there was no error in admitting this evidence.

There was also no error in admitting evidence of Marroquin's participation in an earlier insurance fraud involving a non-existent Corvette. The testimony concerning the Corvette fraud was tendered at a hearing to determine its admissability, and the district court found that this evidence was highly probative of intent and was not unduly prejudicial. *See United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978). Throughout trial Marroquin maintained that he had no intention to defraud the insurance companies, and that he did not know how the false information he supplied them would be used. The evi-

dence of his past creation of fictitious documents in relation to an automobile insurance fraud was evidence that he did know how insurance companies would use the information and that he did have the intent to defraud the insurance companies issuing the equine insurance policies. *See United States v. Chenault*, 844 F.2d 1124 (5th Cir. 1988; *United States v. Gordon*, 780 F.2d 1165 (5th Cir. 1986). The district court did not abuse its discretion in admitting this evidence.

VI. Sufficiency of Evidence

There are two basic issues on which Marroquin contests the sufficiency of the evidence as a basis for his convictions. First, he claims that there was insufficient evidence to prove that he did not pay what he claimed he paid for two of the horses. Second, he claims that there was insufficient evidence to prove that he intended to defraud the insurance companies. These assertions are contrary to the record which shows that there was sufficient evidence to convict him on all counts.

There was conflicting evidence about the amount that was paid for two of the horses: Marroquin had a Bill of Sale for $25,000, but two people testified that he only paid $6,000, showing bank receipts for that amount. Especially given that there was evidence that Marroquin had forged documents relating to other horses, there was ample evidence for the jury to determine that his insurance claim was for more than the purchase price of the horses.

Marroquin's claim that there was insufficient evidence to find intent to defraud is likewise specious. There is evidence that he falsified the purchase price of various horses, sent that information to the insurance companies when applying for insurance *and when making loss claims*, and that he collected money under the policies. There was certainly enough evi-

dence that this was all part of a scheme to make money at the insurance companies' expense, as the horses Marroquin purchased had an alarming propensity to die shortly after he purchased them and insured them for far greater than their true purchase price. This was enough evidence for the jury to have determined beyond a reasonable doubt that Marroquin had the requisite intent.

VII. CONCLUSION

Marroquin first claimed that there was too great a delay in bringing him to trial, then claimed that not enough time had passed before bringing him to trial. It is precisely this sort of gamesmanship that Congress must be avoided in the administration of the Speedy Trial Act, and we therefore abide by the plain language of that statute in holding that the exclusions of section 3161(h) do not apply to the computation of time under section 3161(c)(2). Accordingly, Marroquin was brought to trial in the time allowed under the Speedy Trial Act. Marroquin has not properly raised his multiplicity claim in this court as it was never raised in the court below, the trial court's charge to the jury was correct, and Marroquin's claims relating to the admissability and sufficiency of the evidence are without merit.

AFFIRM.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-6163

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ERIC MARROQUIN,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Texas

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ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC
(Opinion September 27, 5 Cir., 1989 ____ F.2d ____)
(OCTOBER 30, 1989)

Before BROWN, REAVLEY and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

(x) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Patrick E. Higginbotham
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

UNITED STATES OF AMERICA	§	
VS.	§	CRIMINAL NO. B-87-00030-CR(1)
ERIC MARROQUIN	§	

FINDINGS CONCERNING
DEFENDANT'S MOTION TO DISMISS

Steve Rienstra, counsel for defendant Eric Marroquin, has not waived speedy trial, and has filed a motion to dismiss the indictment under the Speedy Trial Act, and failure of the government and the court to bring Marroquin to trial within the limitations imposed by that Act. The court denies said motion for the following reasons:

That eight defendants were enjoined in the same indictment, those defendants being Eric Marroquin, Michael McKinney, Robbie Borque, Pierre Eversole, George Holder, Charles Ferguson, Arden Read, and by the first supplemental indictment which was returned on August 7, 1987, Rodrick L. Primeaux and Donna Primeaux. They made their initial appearance on August 11, 1987, and the court had previously indicated that the case would be set for the week of August 17, 1987. This would be less than thirty days after the joinder in the first supplemental indictment of the defendants Rodrick Primeaux and Donna Primeaux. All of the other defendants included in Marroquin, were either in the same August 7, 1987, supplemental indictment. The second superceding indictment was returned August 28, 1987, and included all nine defendants.

The court had previously entered an order for the filing of all pretrial motions, which was in conflict with the order entered

by the Honorable Earl Hines, United States Magistrate, on the filing of discovery motions and consequently, the court permitted the filing of such motions be timely filed, even though they were after the date originally set by this court.

The record will show that the defendant Arden Read filed the following motions:

On August 5, 1987, Arden Read filed a motion for severance, and to continue the case. The order of severance was kept under advisement by the court until it was effectively ruled upon on the 15th of October, 1987. In addition, on September 15, Arden Read filed motions for discovery, motion for production of Jencks Act materials, co-conspirator evidence, the release by the government showing any evidence sought to be introduced under Rule 404b of the Rules of Evidence, on 9-28, filed a motion for bill of particulars, filed a motion for Rule 30, Federal Rules of Criminal Procedure, and on October 9, filed a motion to sever for misjoinder, and on the 15th of October, filed a waiver of speedy trial, which was approved.

Rodrick Primeaux on 9-25, 1987, filed a motion for bill of particulars, motion to sever, motion to dismiss. Donna Primeaux filed the same motions on the same dates.

Michael McKinney, on August 7, filed a motion to continue. On September 8, 1987, a motion to discover witnesses, motion for bill of exceptions, and motion to adopt all co-defendant motions, filed also a Rule 30, Federal Rules of Evidence, and on the 18th of September, filed a motion to continue.

Eric Marroquin filed a motion to sever on September 15, 1987, and on the 15th of September, filed a motion to adopt co-defendants' motions, filed a Rule 30 motion, and a motion for severance. On 10-6-87, the government filed its response to the motion for severance, and on 10-19-87, defendant filed a motion to dismiss for failure to provide defendant Marroquin a trial within the time allowed.

Robbie Bourque was arrainged on the third indictment on several counts, and reflected by the docket sheets, and on 6-29-87, filed a motion to substitute counsel; on October 6, 1987, filed a motion for continuance; on August 10, 1987, filed a waiver of speedy trial; 9/16/87 filed a reply to government's discovery motion; on 9/24/87, motion for severance; and on 10/16/87, filed a waiver of speedy trial.

Pierre Eversole, on 8/14/87, filed a motion for continance, and I believe the record reflects that he filed other motions, as appear of record, and I believe the record reflects a waiver of speedy trial.

George Holder filed on July 8, 1987, a motion for discovery; on August 5, 1987, a waiver of speedy trial; on 9/15/87, filed a request for extension of time to file motions; on 9/25/87, a motion to sever; on 9/25/87, for the government to file bill of particulars; and on 10/16/87, a waiver of speedy trial.

Charles Ferguson, on 9/18/87, filed a motion to extend timely filing of motions; on 9/18/87, filed a motion for severance; motion to adopt co-defendants' motions; Rule 30 motion; 9/21/87 and 9/25/87, filed motions for severance.

The record will further reflect that the court held a status conference with all of the attorneys on 9/22/87, and the record will indicate that no rulings were made on any of the motions at that time, but merely a status conference, as reflected by the record.

The court further set for hearing, a hearing on all motions then pending and indicated at that time to all counsel he intended to try this case on October 19, 1987, starting the jury selection thereof, and heard the motions in what amounted to an all-day hearing, or if the court's recollections are correct, the court reporter's record will accurately reflect the time thereof. At that time, the court granted all Rule 30 mo-

tions, granted an oral motion that motions which had been filed until that date would be deemed timely filed unless the record reflects wise, in which case what was stated from the bench in open court will control. The court specifically refused to rule on all motions for severance and all motions for continuance.

On October 15, the court effectively did grant motions for severance as to the defendants Robbie Borque, Pierre Eversole, George Holder, Charles Ferguson, Arden Read, Rodrick Primeaux, and Donna Primeaux.

The trial proceeded to selection of a jury on the announced date of October 19, 1987, all counsel having been informed well in advance that the court intended to try some or all of the defendants at that time.

The trial proceeded four days after the ruling on the motions, in effect, and proceeded to trial on August 19, 1987, by the start of the selection of the jury. The court denies Marroquin's motion to dismiss for failure to meet the terms of the Speedy Trial Act for the following reasons:

That the trial started on October 19, 1987, was within 70 days of the initial appearance of the co-defendants Rodrick Primeaux and Donna Primeaux, and if the court's calculation in its computation of time, it was either the 69th or the 70th day following the initial appearance, which was the first time those co-defendants were indicted. The court thereof is of the opinion that until those defendants were severed, it would proceed within the 70-day period as to those defendants.

Further, with the filing on August 5, 1987, a motion for severance by the defendants Arden Read, and a motion to continue by the defendant Arden Read, which was not ruled upon until October 15, 1987, that such time was excludable under the provisions of the Speedy Trial Act. Further, the court fur-

ther finds with the filing of a motion for discovery of the defendant George Holder which was filed on July 8, 1987, which was not disposed of, and denied as the record may reflect, either upon October 15, which is the court's recollection, or possibly on October 7 if the record made in open court so reflects, that that period of time is excludable under the Speedy Trial Act. In this connection, the court specifically relies upon the holdings of the Supreme Court of the United States in *Henderson v. United States*, and this fact was made known to all counsel in either the month of August or at the latest, the early part of September, and relies on other cases which have been presented to the court, which will be cited in the event that counsel requires.

In addition, since the first hearing on all motions on October 7, 1987, the court was on October 8, 1987, involved in other matters, to-wit, on October 8, 1987, hear lengthy motions in the case of B-87-0564, *Blanks v. Taos;* and 87-0006, *Ramsey v. Blue Bird,* a motion to remand.

October 9, the court's entire day was consumed in chambers in conferences with various attorneys, both for the government, and for litigant's attorneys in civil litigation.

October 12 was a legal holiday.

October 13, the court took up its non-jury docket, and called the docket in the following cases:

B-85-886, *Guillory v. Southwestern Bell*

B-85-1673, *Stelly v. Key Drilling Company*

B-86-0144, *Pellerin v. Dixie;*

B-86-1411, *Herrin v. Newton County.*

On October 14, the court was in trial of the matter of 86-0144, *Pellerin v. Dixie.* On October 15, the court inter-

rupted a civil trial in *Herrin v. Newton County* to hear the motions in *United States v. Marroquin*, at which time the government dismissed the defendant Robbie Bourque, and the court made its ruling that the case would proceed to trial jointly against the defendants Marroquin and McKinney. Additionally on October 15, the court heard sentencing hearings and conferences necessarily attendant thereto in B-87-8-CR, *United States v. Earl Keith Lindell*, and *United States v. William Kinner*.

On October 16, the court started a non-jury case styled *Stelly v. Key Drilling Company*, which was a Friday. That trial was interrupted for the jury selection of this case on October 19, and various motions and conferences attendant thereon, and the court was present the entire day, until approximately 7:00 p.m.

On October 20, the court resumed the trial in the non-jury matter of *Stelly v. Key*, and October 21, 22, and 23, tried the case of *Guillory v. Southwestern Bell*.

In addition to that, as the court records will reflect, during the month of July, dates will be furnished to counsel if required, the court's calendar was taken up with previously set jury and non-jury hearings and trials, and started the criminal conspiracy case on July 27, in the *United States v. Lindell* and others, and which continued in trial until the verdict was reached on August 17, 1987. The calendar of the court required that it attended to numerous other matters that were pending before it, and required attention from that date until the date in early September, the court recalls it being September 14, 1987, when civil juries were selected. Juries were selected in eight cases on that date, and the court assigned them for specific dates for trial, and if counsel desires, the dates will be included in the record, but the court's time was fully consumed in various trials, pretrials, status conferences, applications for

instruction to be used in various condemnation hearings, IRS requested subpoenas, hearings thereon, the appeals from detention orders in what is nown as the "Bandidos" case, the appeal of counsel of some of said cases, that case being B-87-40-CR, involving 20 defendants, the court's hearing numerous hearings on conflict of interest with counsel; the court held hearings on appeals from motions for order of release, and motions for detentioin, and at least two injunction hearings, one involving the necessary consideration of whether a child on Medicaid would or would not be allowed to enter Children's Medical Center for a life-saving procedure of a liver transplant, questions and motions concerning consolidation of that case with sixteen others similarly situated into a class action, and other matters that counsel is fully aware of. However, if counsel further wishes to have those matters made of record, we will recess this case from time to time and day to day until those docket entries are examined for the purpose of this record.

In addition, the court finds that that the defendant's counsel, Steve Rienstra, has actually, although in good faith efforts and zealous protection of this client's rights, which the court commends Mr. Rienstra for doing, actually caused some of the delays, inadvertent though they may be.

In addition, I further find that a portion of the delay resulting from in effect a continuance by this judge on his own motion because of the intricacies, and complex questions by the 74-count indictment involving mail fraud involving nine defendants, and 19 horses, that the ends of justice will be served by proceeding to trial at this time, and the taking of that action by the court outweighs the best interests of the defendant, and regulations in adhering to the time schedule mentioned under the so-called Speedy Trial Act. The reason that the ends of justice will be better served is that the court needed

the time and the opportunity to fully consider all of the motions of the various defendants and this granting severance was indicated, and to insure the attendance of a jury on the day selected on October 19, and had I not taken such time, which I continued in effect on my own motion, the further proceeding against Marroquin virtually impossible, or might possibly result in a miscarriage of justice, and if I have not properly covered this, I further find that counsels' estimate of the four to six weeks to try this case would effectly block the court's docket for the proper administration of justice in the court's proper consideration of trials and hearings in the additional 800 cases pending before this court on this docket.

For all of the above reasons, especially including, but not necessarily limited to, the excludable time from the filing of the first motions by the co-defendants until they were ruled upon as reflected by the orders of this court from the bench or from the documents herein filed, which the court holds would be October 7 on the Rule 30 motions, the denial either on October 7 or October 15, as the record may reflect for the court has entered them as of October 15, the denial of motions for bill of particulars, and motions for disclosure of list of witnesses, some of which may have been effectively announced from the bench on October 7, after all counsel had been made aware that the first time the court could select a jury would be October 19, was all excludable time.

This ruling is being dictated into the record on the court's instructions, and being communicated to counsel, and the court stands ready, willing and able to delay this trial additionally if counsel wishes to make for the court to take the time to assert additional reasons which might now have escaped the court's attention, and the court has informed Mr. Rienstra, counsel for Mr. Marroquin, that there may be other reasons upon further examination of the record, which I intend to do, that other excludable time might be included.

(2)

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No. 89-1198

In the Supreme Court of the United States

OCTOBER TERM, 1989

ERIC MARROQUIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the periods of delay that are excluded from the maximum time limits for commencing trial under the Speedy Trial Act, 18 U.S.C. 3161 *et seq.*, are also excluded from the 30-day defense-preparation period during which trial may not commence.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Cases:

United States v. *Castellano*, 848 F.2d 63 (5th Cir. 1988) 7

United States v. *Daly*, 716 F.2d 1499 (9th Cir. (1983) 7

United States v. *Grosshans*, 821 F.2d 1247 (6th Cir.), cert. denied, 484 U.S. 987 (1987) 7

United States v. *Harris*, 724 F.2d 1452 (9th Cir. 1984) 7

United States v. *Hasting*, 461 U.S. 499 (1983) 7

United States v. *Karsseboom*, 871 F.2d 877 (9th Cir. 1989) 7

United States v. *Mastrangelo*, 733 F.2d 793 (11th Cir. 1984) 4

United States v. *Rojas-Contreras*, 474 U.S. 231 (1985) 4, 5-6, 7

United States v. *Wooten*, 688 F.2d 941 (4th Cir. 1982) 4

Statutes:

Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.* 2

18 U.S.C. 3161(b) 7

18 U.S.C. 3161(c) (1976) 4

18 U.S.C. 3161(c)(1) 7

18 U.S.C. 3161(c)(2) 2, 3, 4, 5, 6, 7

Statutes – Continued: Page

18 U.S.C. 3161(d)(2) 3, 5
18 U.S.C. 3161(e) 5
18 U.S.C. 3161(h) 3, 4, 5, 7
18 U.S.C. 3161(h)(8)(B)(iv) 7
Speedy Trial Act Amendments of 1979, Pub. L. No. 96-43, § 3, 93 Stat. 327 4
18 U.S.C. 371 2
18 U.S.C. 1341 2

Miscellaneous:

H.R. Rep. No. 390, 96th Cong., 1st Sess. (1979) 3, 5
S. Rep. No. 212, 96th Cong., 1st Sess. (1979) .. 3, 5
The Speedy Trial Act Amendments of 1979: Hearings on S. 961 and S. 1028 Before the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. (1979) 6

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 885 F.2d 1240. The findings of the district court (Pet. App. 17a-24a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1989. A petition for rehearing was denied on October 30, 1989 (Pet. App. 15a-16a). The petition for a writ of certiorari was filed on January 26, 1990, and is therefore out of time under Rule 20.1 of the former version of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Texas, petitioner was convicted on 24 counts charging mail fraud and conspiracy, in violation of 18 U.S.C. 1341 and 371. He was sentenced to a total of 25 years' imprisonment and he was fined a total of $100,000. He was also ordered to make restitution in the total amount of $198,000. The court of appeals affirmed.

1. The evidence at trial, which is not in dispute, showed that petitioner engaged in a scheme to defraud insurance companies. Petitioner bought insurance policies on race horses, falsely inflating the purchase price of each horse. Shortly after the policy issued, petitioner reported the horse dead or stolen, and collected the insurance proceeds. To carry out his scheme, petitioner enlisted the help of others who either served as straw owners for the horses or provided him with the false documents needed to substantiate the inflated worth of the horses for his insurance claims. Gov't C.A. Br. 3-11.

2. A 58-count indictment returned on June 8, 1987, charged petitioner and six others with mail fraud and conspiracy. Petitioner first appeared with counsel on these charges on June 18, 1987. Thereafter, superseding indictments were returned on August 7 and 28, 1987. Jury selection began on October 19, 1987. On that day, petitioner filed a motion to dismiss the indictment for a violation of the 70-day limit of the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.* The district court denied the motion, finding that only 24 nonexcludable days had passed since the indictment. On October 26, 1987, petitioner moved to discharge the jury (which had not yet been sworn) on the ground that he had not been accorded the minimum 30-day defense-preparation period that is provided for in Section 3161(c)(2) of the Act. The following day, the district court

postponed the start of trial until November 2, 1987, to give petitioner some additional preparation time. Trial was postponed for one additional day to November 3, 1987. The jury was sworn on that day. Pet. App. 2a; Gov't C.A. Br. 2-3, 13, 17.

3. The court of appeals affirmed. The court rejected petitioner's argument that trial commenced less than 30 days from the date on which he first appeared with counsel. The court held that the 30-day preparation period guaranteed by Section 3161(c)(2) is 30 calendar days, and that the periods of excludable delay enumerated in Section 3161(h) do not enlarge the 30-day minimum defense-preparation period. The court pointed to the language of Section 3161(h), which states that certain periods of delay "shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence." Pet. App. 4a-5a. Section 3161(h) contains no language suggesting that it applies to the minimum defense-preparation period, however. Pet. App. 4a-5a. Furthermore, the court observed, whenever Congress wished the exclusions to apply, "it said so in clear and unmistakable language." Pet. App. 5a, citing Section 3161(d)(2). The court acknowledged that the 1979 Senate Report states that the exclusions apply to Section 3161(c)(2) (see S. Rep. No. 212, 96th Cong., 1st Sess. 32 (1979)), but the court did not find that legislative history compelling. The court noted that there was no similar statement in the House Report (see H.R. Rep. No. 390, 96th Cong, 1st Sess. (1979)), and that the courts and advisory guidelines have not so construed the statute. Pet. App. 6a. The court further observed that such a reading of the statute does not place defendants at a disadvantage because a "defendant may still be granted a continuance on any appropriate ground." Pet. App. 7a. Finally, the court observed the even if Section 3161(c)(2) was violated, petitioner is not entitled to relief because he was not prejudiced by the failure to delay his trial. Pet. App. 7a.

ARGUMENT

Section 3161(c)(2) provides that "[u]nless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se." Petitioner's trial began 123 days after his first appearance through counsel (June 18 to October 19). He contends, however, that the 30-day period is not to be measured in calendar days, but that it is extended by the periods of excludable delay set forth in Section 3161(h) of the Speedy Trial Act. The court below, like every other appellate court that has considered the issue, properly concluded that the defense-preparation period is calculated without reference to the Section 3161(h) exclusions. Accord *United States* v. *Mastrangelo*, 733 F.2d 793 (11th Cir. 1984); *United States* v. *Wooten*, 688 F.2d 941 (4th Cir. 1982).

As originally enacted, Title I of the Speedy Trial Act of 1974 set only outside time limits within which a criminal case had to be tried. See 18 U.S.C. 3161(c) (1976). The statute set no limit on the degree of expedition permitted. To ensure that defendants are not rushed to trial without an adequate opportunity to prepare, Congress amended the Act in 1979 to provide both a maximum time limit for commencing trial (70 days from the indictment or the defendant's first court appearance) and a minimum time period during which trial may not commence (30 days from the defendant's first court appearance with counsel). Speedy Trial Act Amendments of 1979, Pub. L. No. 96-43, § 3, 93 Stat. 327. See *United States* v. *Rojas-Contreras*, 474 U.S. 231 (1985).

The language chosen by Congress makes clear that the 70-day maximum time limit and the 30-day defense-preparation period are not to be calculated in the same

manner. Section 3161(h) excludes certain periods when calculating the last permissible date for returning an indictment or starting trial: "[t]he following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed [30 days from an arrest on federal charges], or in computing the time within which the trial of any such offense must commence [usually 70 days from indictment]." Likewise, Sections 3161(d)(2) and 3161(e), which sets maximum time limits for bringing a defendant to trial following reinstatement of an indictment or the grant of a new trial, also state explicitly that "[t]he periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in [these] section[s]". In contrast, the Act does not state that the periods of delay enumerated in Section 3161(h) are excluded when computing the 30-day defense-preparation period. The difference in language clearly indicates that the defense-preparation period should be measured in calendar days.

To support his argument that the mandatory defense-preparation period is not measured in calendar days, petitioner relies on the 1979 Senate Report, which states that it is "the Committee's intent that the exclusions provided in section 3161(h) apply to the 30-day minimum to-trial provision" (see S. Rep. No. 212, *supra*, at 32). The force of that single statement, however, is undermined not only by the plain language of the statute, but also by other features of the legislative history.

First, the House Report on the legislation contains no similar suggestion that the method of calculating the two periods should be the same. See H.R. Rep. No. 390, *supra*. Second, Section 3161(c)(2) was derived from a set of guidelines issued by the Judicial Council of the United States Court of Appeals for the Second Circuit. *United States* v.

Rojas-Contreras, 474 U.S. at 235-236; see *The Speedy Trial Act Amendments of 1979: Hearings on S. 961 and S. 1028 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 122, 386-436 (1979). Those guidelines provide that the trial court should liberally grant a defendant's request for a continuance whenever trial is scheduled within the first 30 days following arraignment. *Id.* at 392-393. The Second Circuit guidelines do not mandate such a continuance where trial is scheduled after the first 30 calendar days but within the first 30 nonexcludable days.

The policies underlying the Speedy Trial Act also strongly support the construction of the statute adopted by the court below. The Act was designed to require that criminal cases be processed more expeditiously, consistent with the defendant's right to a fair trial. The exclusions of various periods of delay from the 70 days allotted for commencement of trial were put into the statute to provide the flexibility needed to accommodate complex cases and unavoidable delays. The 30-day minimum defense-preparation period was included to ensure that the defense would have at least 30 days between indictment and trial to prepare to meet the charges. The excludable delay provisions recognize that, for example, a court may need extra time to decide pretrial motions and therefore will not be able to begin the trial within 70 days of the indictment. There is no reason, however, to extend the defense-preparation period in which trial may not begin in the same way that the 70-day maximum time limitation is extended, since the fact that the court may need extra time to decide pretrial motions does not mean that the defense needs the same period of extra time to prepare for trial. In short, it would be entirely inconsistent with the purposes of the Speedy Trial Act to require that any time a trial *may* be delayed, it *must* be delayed.

Construing Section 3161(c)(2) as written does not give rise to a due process violation, as petitioner intimates (Pet.

14-15). As this Court made clear in *United States* v. *Rojas-Contreras*, *supra*, Section 3161(h)(8)(B)(iv) of the Act "places broad discretion in the District Court to grant a continuance when necessary to allow further preparation." 474 U.S. at 236. In this case, the district court did not abuse its broad discretion; even though petitioner did not seek a continuance until after jury selection had begun, the court nonetheless accommodated petitioner's request by granting an eight-day continuance before swearing the jury. Petitioner does not suggest how he was prejudiced by the district court's failure to provide an even longer continuance either earlier or at that time.*

None of the cases cited by petitioner conflicts with the decision below. For example, *United States* v. *Castellano*, 848 F.2d 63 (5th Cir. 1988), did not involve the defense-preparation provision, Section 3161(c)(2). In that case, the court merely noted that the periods of delay enumerated in Section 3161(h) are excluded from calculating both the 30-day time limit for obtaining an indictment (Section 3161(b)) and the 70-day time limit for commencing trial (Section 3161(c)(1)). Likewise, *United States* v. *Daly*, 716 F.2d 1499, 1506 (9th Cir. 1983); *United States* v. *Harris*, 724 F.2d 1452, 1454 (9th Cir. 1984); and *United States* v. *Karsseboom*, 871 F.2d 877, 879 (9th Cir. 1989), do not help

* Because petitioner was not prejudiced by the district court's decision to commence trial on November 3, 1987, he would not be entitled to any relief on appeal even if Section 3161(c)(2) were violated. *United States* v. *Grosshans*, 821 F.2d 1247, 1252-1253 (6th Cir.), cert. denied, 484 U.S. 987 (1987). But see *United States* v. *Daly*, 716 F.2d 1499, 1506 (9th Cir. 1983) (awarding defendant a new trial). The Speedy Trial Act contains no sanction for violations of this provision. See 716 F.2d at 1506 (holding that the Act's dismissal sanction for a violation of the maximum time limits does not apply to violations of Section 3161(c)(2)). Accordingly, in the absence of a statutory sanction or prejudice, any error must be deemed harmless. *United States* v. *Hasting*, 461 U.S. 499, 509 (1983).

petitioner, because none of those cases considered the applicability of the exclusions to the defense-preparation period. In *Daly*, the court discussed the starting date for the defense-preparation period where a defendant obtains new counsel following arraignment. In *Harris*, the court held that a defendant must receive a new preparation period following the return of a superseding indictment. This Court held to the contrary in *Rojas-Contreras*. And in *Karsseboom*, after noting that both the 30-day preparation period and the 70-day indictment-to-trial period should be calculated with reference to the original indictment, the court of appeals held that trial commenced too late, not too soon. In short, no case adopts the position urged by petitioner, namely, that the 30-day preparation period is lengthened automatically by excludable delay. Further review of this question is therefore not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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October Term, 1989

ERIC MARROQUIN,

Petitioner,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner files this Reply Brief to correct a gross misstatement by the Government as to the timeliness of the Petition, as well as to respond briefly to some of the arguments advanced in the Opposition Brief.

1. Timeliness of the Petition

The Opposition Brief, signed by the Solicitor General of the United States, states on the first page that, a rehearing petition having been denied by the Fifth Circuit on October 30, 1989, "[t]he petition for a writ of certiorari was filed on January 26, 1990, and is therefore out of time under Rule 20.1 of the former Rules of this Court." That statement is simply not true. It ignores the fact that Justice White, on timely application under former Rule 20.1, extended the time for filing the petition to and including January 26, 1990.

The extension of time ordered by Justice White was plainly set forth in the Petition, p. 2, under the section entitled JURISDICTION. The case file in the Clerk's Office confirms that the application for the extension was timely filed, well before the expiration of the 60-day period. The application itself recognized that under Rule 20.1 the time for filing would expire 60 days from the denial of rehearing, on December 29, 1989, unless extended. The application thus requested "that the time for filing be extended, pursuant to Rule 20.1, for 28 days, to and including January 26, 1990."

It is impossible to square such an egregious misstatement with the high quality of advocacy that normally marks the Office of the Solicitor General of the United States.

2. The ambiguity of the Act

The Government argues (Op.Br. 4-5) that the language of the Speedy Trial Act amendments of 1979 "makes clear" that Congress did not intend to subject the 30-day defense-preparation period to the time exclusions of §3161(h). That assertion, however, does not dispose of the counter-argument that the Act is anything but clear in that respect. Consider what one of the leading experts on the 1979 amendments, Professor Robert L. Misner, says about this matter:[1]

a) "A careful examination of the legislative history of the

[1]Professor Misner was the reporter for the Speedy Trial Planning Group for the U.S. District Court for the Districts of Arizona and Southern California. He also testified before the Senate Judiciary Committee with regard to the 1979 amendments. That is the Committee that produced Sen. Rep. 96-212 (1979), stating that it was the Committee's intent "that the exclusions provided in section 3161(h) apply to the 30-day minimum to trial provision." See Pet. 13-14.

thirty-day minimum to trial amendment [§3161(c)(2)] is ambiguous as to the applicability of excludable time."[2]

b) "On their face, the provisions of the Act that prescribe sanctions favor the conclusion that excludable time does apply to the thirty-day minimum to trial period."[3]

c) "Resort to noncongressional sources does not alleviate the confusion."[4]

d) The 1979 amendments "are so confusing that an outbreak of litigation concerning the interpretation and applicability of their terms is to be expected."[5]

Precisely this kind of confusion and uncertainty surrounding the applicability of time exclusions to the 30-day minimum period specified in §3161(c)(2) justifies the grant of certiorari. Moreover, since this statutory interpretation problem is of such confusing and uncertain dimensions, the Court should consider whether the long-established rule of lenity here applies: "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812 (1971). See also *Dixson v. United States*, 465 U.S. 482, 491 (1984):

> As is often the case in matters of statutory interpretation, the language of [the statute] does not decide the dispute. The words can be interpreted to support either petitioners' or the Government's reading. We must turn, therefore, to the legislative history . . . to determine whether these materials

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[2]Misner, The 1979 Amendments to the Speedy Trial Act: Death of the Planning Process, 32 Hastings L.J. 635, 644 (1981).

[3]*Id.* at 646.

[4]*Id.* at 649.

[5]*Id.* at 657.

> clarify which of the proposed readings is consistent with Congress' intent. If the legislative history fails to clarify the statutory language, our rule of lenity would compel us to construe the statute in favor of petitioners, as criminal defendants in this case.

That is the principle that unravels this statutory enigma.

3. The prejudice to petitioner

The Government nowhere denies that the Fifth Circuit conceded that "less than thirty includable days had passed before his [petitioner's] trial commenced." Pet. App. 4a. But the Government asserts that petitioner "does not suggest how he was prejudiced" by that conceded fact. Opp.Br. 7.

The Government seemingly has not read the Petition very carefully. Petitioner there "suggested" that, as a result of the conceded violation of the 30-day minimum to trial period, he was not given adequate time to prepare a full defense to the charges against him — i.e., he was accorded less than the required thirty-day minimum period in which to prepare for a trial after he finally discovered or was advised "which if any of his co-defendants would be tried with him, which of the multitude of charges would be at issue at the trial, or which severed co-defendants might testify against him." Pet. 14. Indeed, the excessive and harsh sanctions resulting from this hasty trial, 25 years imprisonment and more than $300,000 in fines, could not be more prejudicial.

Finally, the Government has no response to petitioner's contention (Pet. 15) that he need not show prejudice where there has been a conceded violation of §3161(c)(2). As this Court noted in *United States v. Taylor*, 108 S.Ct. 2413, 2417 (1988), where there is a violation of a time limitation imposed by §3161(c), "the statute admits no ambiguity in its requirement

that when such a violation has been demonstrated, 'the information or indictment shall be dismissed on motion of the defendant,' [citing §3162(a)(2)]." Suffice it to say that petitioner made such a motion to dismiss, the denial of which leads to the question now before this Court. Prejudice, in short, may be presumed from the conceded violation of §3161(c).

CONCLUSION

For the foregoing reasons, supplementing those in the Petition, certiorari should be granted.

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